IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO. 569 OF 1999

Amitabh @ Amit @ Rana Sameer Roy ..... Appellant.

versus

The State of Maharashtra ..... Respondent.

.....

Shri Thomas Jacob for the appellant.
Mrs. Usha V. Kejariwal APP for the State.

.....

CORAM ; V.G.PALSHIKAR &
SMT. NISHITA MHATRE, JJ.

DATED; 22ND MARCH, 2005.

ORAL JUDGMENT (Per Palshikar, J.):

1. Being aggrieved by the judgment dated 26-09-1999 passed by the Additional Sessions Judge, Bombay in Sessions Case No. 893 of 1994, the appellant has preferred this appeal on the ground mentioned in the memo of appeal as also canvassed before us.

2. With the assistance of the learned advocate appearing on behalf of the appellant and the learned APP, we have scrutinised the entire record, and re-appreciated the evidence both oral and documentary as is raised on the record before the Additional Sessions Judge.

3. The prosecution case as revealed on re-appreciation of evidence stated briefly is that on 7th March 1994 one Amit son of Vimal Kumar Rathi was kidnapped from Yari Road, Versova where he had gone to take tuitions. According to the prosecution, thereafter P.w.14 Vimal Kumar received a telephone call demanding a ransom of Rs. 5 crores for Amit. These calls were repeated and ultimately the police apprehended the accused on 10-3-1994. He was arrested, investigation was carried out. The accused had made a statement under section 27 of the Evidence Act on 11-3-1994 whereby he disclosed that he will point out the dead body. Accordingly search was made and the dead body of the victim Amit was found. After completing the investigation the accused was charged under sections 363, 387, 364, 364 A and 302 of the IPC.

4. The prosecution examined 26 witnesses to prove its case. Though 26 witnesses were examined the entire evidence is circumstantial. Appreciating the circumstantial evidence, the learned Additional sessions Judge came to the conclusion of guilt and convicted the accused to suffer R.I. for seven years and life imprisonment under section 302 IPC. The learned Sessions Judge, however, ordered that the

sentences for offences punishable under sections 363 and 387 shall run concurrently and the sentence of imprisonment for life shall run after the expiry of the said concurrent sentences. As aforesaid, feeling aggrieved by this order, the above appeal is preferred.

5. The impugned order is assailed by the learned counsel appearing on behalf of the appellant on several grounds, stated briefly they are:

1. The prosecution has failed to prove that accused Amit was the person who called as Abdul and demanded the ransom. The evidence on record, according to the learned counsel in relation to this proof is unsatisfactory, untrustworthy and therefore liable to be rejected.

2. The prosecution has failed to establish that it was Amit, the appellant, who kidnapped and murdered the victim Amit. The death is by strangulation and there is no conclusive proof connecting the accused to that strangulation.

3. The arrest of the accused from the telephone booth is false and is creation of the prosecution. The accused was factually arrested from his house and the arrest is shown from the booth to connect the accused with the crime.

6. The learned counsel appearing on behalf of the appellant has failed to elaborate the submissions and has assailed each circumstance proved against the accused. We would deal with those challenges as and when we discuss the same.

7. These contentions of the learned advocate of the appellant are countered by the learned A.P.P. by stating that the prosecution has successfully proved that the accused was the person who called as Abdul and demanded the ransom. The recovery of the dead body is properly proved. Admittedly the accused had the custody of Amit and the death is proved to be homicidal. There is no error, according to the learned A.P.P. in the order of conviction.

8. We have to consider these rival contentions in the light of the evidence we have with the able assistance of the learned counsel and the learned Prosecutor. We

will discuss various aspects of the evidence as put forth before us by both the sides.

9. P.w.1 Narendra Dhamare prepared the map showing the house of the victim, the house of the accused and the tuition teacher's house etc. It is a factual description of the spot and is not disputed by anybody. P.w.2 Ashok Gangulay is the person who lodged the complaint and who took Amit the victim to the tuition class on 7-3-1994 between 5 and 7 p.m. He therefore reported to the father of the victim the fact that Amit was missing, and lodged the complaint and that he was a caretaker of the victim during the relevant time. He was also present when the body was recovered and thereafter has identified the body as that of Amit. The witness has been adequately cross examined and the cross examination does not reveal any material omissions or contradictions which would require the evidence being disbelieved.

10. Mr. Thomas Jacob the learned advocate appearing on behalf of the accused claimed that this witness be disbelieved because he does not state with any clarity as to how he identified the dead body, how he attended the funeral because he did not know the name of the person who claimed the body. He has stated that he saw

the dead body at the residence of the accused before funeral. But till 10.30 p.m. the body was in Cooper Coroner and therefore could not have been seen by the witness at the residence of the accused. However we find it difficult to accept all these contentions. It is true that the body was lying at Cooper Coroner till 10.30 p.m. but that cannot falsify the statement of the witness that he saw the body of the victim at the residence before funeral. He was closely associated with the victim and one cannot accept minute to minute account of the entire episode from such a witness. As we have already observed, his testimony was rightly accepted by the learned trial Judge. So accepting of what is proved by this witness is that Amit went to tuition on 7-3-1994 and did not return after the tuition was over and that the matter was reported by this witness to the parents and the police, and that he also identifies the body as that of victim Amit.

11. P.w.3 Rajul Grewal is the tuition teacher, who used to teach the victim Amit, Mathematics at the relevant time. She has deposed that the victim was not a very regular student and therefore she was not surprised to see that Amit was not present on that day. She has categorically stated that she was taking tuition only for Mathematics. There is no reason

whatsoever to discard the evidence of this witness, which proves that on 7-3-1994 Amit did not attend the tuition is proved.

12. P.w.4 Fakira Singh is the watchman in the society where the tuition teacher P.w.3 is residing and giving tuition. He identified the accused in test identification parade. He has stated during cross examination of his evidence that he does not know much about the matter and did not recognise the victim Amit amongst those who attended the tuition on that day. Relying this statement made at page 163, it is contended for the accused that the witness having admitted that he did not know anything of the matter, his identification is liable to be rejected. We are unable to accept this statement for the simple reason that the statement that he did not know anything about the matter has to be read as a whole and is not distinctive. The deposition reads as under:

> "Thereafter police came. They made inquiries with me. I told them that I did not recognise that particular boy and I did not know anything about the matter. I was taken to D.N.Nagar Police station in the police vehicle."

The statement that I did not know anything about the matter pertains to a particular boy whom he did not recognise i.e. the victim. It cannot be read to mean that the witness did not know anything about the entire case. The submission of the learned advocate that the evidence is liable to be rejected is therefore unfounded and is liable to be rejected.

13. P.w.5 is Ashok Kodak who took photographs of the dead body. Nothing turns from the evidence of this witness. P.w.6 Sheshnath Dubey is a panbidi shopwala in the locality and has stated that the accused purchased expensive cigarettes from him. The evidence of this witness is wholly inconsequential, even if it is accepted that the accused did buy costly cigarettes, that cannot itself connect the accused to the crime. His evidence is grossly irrelevant and is liable to be ignored.

14. Similarly the evidence of P.w.7 Farad Kapadia need not be considered as all that he has stated is that he attended the tuition classes alongwith Amit and Akshay. P.w.8 Akshay was a student who accompanied Amit to tuition on 7th March 1994. He has deposed that when

they were between 2nd and 3rd floor of the building, a man wearing monkey cap came down running from the stair case towards them. He warned them not to tell anybody of his being present there. He told that there was some business problem with Amit's father and that Amit's father sent him for taking Amit. He only proves the fact that the man came and took away Amit. It is true that he did not identify the accused in the court. But he was not examined as a witness and he did not say that it was this accused who took away Amit on that day. Therefore there is no reason to discard the evidence of this witness who only proves that Amit was taken away from the tuition class building on 7-3-1994 as alleged by the prosecution.

15. P.w.9 Elizabeth Jacob is am employer of the accused who states that the accused stopped working after October 1993. His evidence is also grossly irrelevant. Similar is the evidence of P.w.10 Surendra Hooda which is inconsequential and does not help the prosecution in any manner. Same is the case of P.w.11 who deposed that he gave a loan of Rs. 1,50,000/- to one Ravi Bhatnagar and that Bhatnagar told the witness that the accused will repay the amount of loan. Even if this statement is a complete truth it is not of any help to the prosecution as the entire evidence of this

witness is inconsequential for the prosecution of the accused.

16. P.w.12 Mohamed is a driver who drove Amit to tuition classes on 7-3-1994. He thus corroborates the testimony of P.w.2 to that effect. The prosecution has therefore via P.ws. 2 and 12 established the fact that the victim Amit did go to the tuition class on 7-3-1994 in the evening.

17. P.w.13 is Vimal Bharatiya, who has deposed that the accused was like a family member to him and he had certain relations with his daughter. Whether it is true or not is grossly irrelevant for the purposes of the prosecution. The case of the prosecution is that the accused kidnapped Amit and killed him and all this was done by him for ransom using the name of Abdul. Whether the accused had any relationship with the daughter of P.w.13 is irrelevant for the purposes of this prosecution. His evidence is therefore liable to be ignored.

18. P.w.14 Vimal Rathi is the father of the victim. He has deposed in extenso how the entire episode occurred. He states that he received a call from P.w.2 regarding Amit not coming back from tuition on

7-3-1994. He went to the place of tuitions found that the boy was missing. He then went to D.N.Nagar police station when he was told from his home that he was called by one Abdul. He therefore went back to home to wait for further call from Abdul. He then deposed how police made arrangement to tape recording the telephone calls received from his residence, how calls were recorded and how police apprehended the accused on 11-3-1994. He was then called at the police station where he was shown the body which he identified as that of Amit. He also identified several articles i.e. note books etc. as belonging to victim Amit. The evidence of this witness is assailed by the defence contending that it is a mixture of truth, imagination and surmises. Relying on Exh.82 it was contended by the learned counsel that the body was at Mira road at 7.30 p.m. and therefore there is no question of this witness identified the body at D.N.Nagar police station at 7.30 p.m. This contention is affirmed for the simple reason that what is deposed by this witness is around 7.30 p.m. he received information about apprehending the accused by police and he then called at the police station and he went there and thereafter identified the body. It is true as contended by the witness that there is no statement by this witness that he claimed the dead body for funeral. But the fact

that funeral was conducted as stated by the witness. Merely because there is no statement with the police that the dead body was claimed by P.w.12 it cannot be said that the entire claim of the witness that he identified the body and claimed it and conducted the funeral is false. There is no reason for such minor variation and to disbelieve the entire testimony of the witness who had no reason to state anything else than the truth. The fact that he lost his son is proved beyond doubt, the fact that he received such calls for ransom from Abdul is also true and therefore the testimony of the witness is liable to be accepted as was rightly done by the learned trial Judge.

19. P.w.15 is P.C.Abdul who apprehended the accused near the public call office in the compound of Irla Telephone Exchange. The evidence of this witness is tried to be discredited by pointing out the telephone numbers and the station. There is ample evidence on record to show that the calls were received from the numbers which the prosecution claims and the accused was arrested near one such number. We see no reason why the testimony of this witness should be rejected.

20. P.w.16 Baban is a panch witness who accompanied

the accused and the police to Mira road where the accused pointed out the dead body in the nallah and certain articles belonging to victim Amit were recovered at his instance. There is nothing in the testimony of this witness and the fact that certain articles and the dead body of the victim Amit were recovered at the instance of the accused is well established. The testimony of this witness is sought to be discredited solely on the ground that Amit was kidnapped from the tuition class and yet all the books of various subjects were found in his school bag and therefore the entire story of the prosecution is false. This submission is misconceived. The driver of the vehicle in which Amit used to move has stated that he used to take Amit to school and that merely because other subjects books were in the bag, it cannot be said that the entire testimony of the witness is liable to be accepted. We therefore reject this contention as misconceived.

21. The evidence of P.w.17 Dr. Rajendra is very important. He has found that the voice of Abdul as disclosed by the taped version of the telephone calls received by police matches with that of the accused. He is an expert and he has given the details about how the voice was matched and how it matches with that of

the accused. The expert testimony of this witness is not in any manner shaken by the cross examination. Though the learned trial Judge has not accepted the testimony of this witness, we see no reason to reject his version for any count. He has therefore proved beyond doubt the fact that the voice of Abdul on the telephone and the voice of the accused on tape did match and it was the accused by using the name of Abdul who had made ransom calls.

22. Yet another important witness is P.w.18 Mandvikant Tiwari who has identified the accused as the person who made calls from the booth near Central Bank Colleagues society at Vile Parle on 9-3-1994 between 7.30 and 8.00 p.m. The fact that the accused did make certain calls on 9th March is established. Certain calls on that day were also received at the house of P.w.14 is also established.

23. P.w.19 Bagirao Budhwale took the body for post mortem. P.w.20 Anwar is the Special Executive Magistrate, who conducted the identification parade and has proved that it was conducted as per the guidelines and there has been substantial compliance of the guidelines. There is therefore no reason to discard

the evidence of this witness.

24. P.w.21 Shyam Kargutkar is a panch in whose presence articles were recovered from the house of the accused. The testimony of this witness in our opinion, is inconsequential in as much as such household items can be present in any house. Nothing much turns on the evidence of this witness. P.w.22 Sushail Mohd. is the police officer who tape recorded the telephone conversation. There is nothing in his testimony to discard his evidence regarding recording of calls and also the telephone calls received at the residence of P.w.14. P.w.23 is the doctor who conducted post mortem on the body of victim Amit. He has proved that the body was decomposed but the death occurred due to strangulation. He has accepted that the body was in the water and therefore decomposed faster. From the testimony of this witness the learned advocate for the defence wanted to establish that body discovered by him was there for four days atleast prior to the time of post mortem examination. So considered it cannot be of Amit. We are unable to accept this contention for the reason that there has been positive identification of the dead body by P.ws.2 and 14 and that identification cannot be nullified with reference to the post mortem

conducted on a decomposed body.

25. P.w.24 Bushan is the P.S.I. who taped the calls received at the residence of P.w.14. He has described how he ascertained the location from where the kidnapper called. He has given complete description of the manner in which this process was undertaken. The reasons given by the advocate for discrediting this witness are baseless. Merely because there was no mobile facility existing in the year 1994 it cannot be held that there was no other means of communication between the police station and at two different places.

26. P.w.25 Bhim singh is a person who has proved that the calls were under observation and were received as stated by the department in the print out. There is no reason why the evidence of this witness is liable to be rejected. The last witness is P.w.26 Jagdev the investigating officer, who has given detailed evidence showing how each link in the circumstantial evidence was duly proved by the prosecution. It is true that he has not recorded any statement pertaining to handing over of the dead body. But nothing turns on it,and the fact that it was handed over and cremated is established. The fact that non supply of the letter from MTNL also does not discredit the entire testimony

of this witness. The witness cannot be disbelieved that he was never visited the school where Amit was studied. He has got enquiries done and which as a part of investigation is adequate. The averments regarding change of Prosecutor, efforts of the investigating officer to get the special Public Prosecutor reappointed are grossly irrelevant for the purposes of appreciating the evidence of the investigating officer. We see no reason that any of these statements are liable to be accepted.

27. The prosecution has proved each circumstance and there is no misleading in the chain of circumstances proved beyond doubt of the involvement of the accused in kidnapping and murdering the victim Amit. When the voice has been compared by the expert and it is found to be that of the accused, reasons canvassed by the learned advocate for rejecting the fact of telephone calls being made by the accused are unsustainable. It is the case of the accused himself that he has some relationship with the sister of the victim who is now settled in America, and therefore this crime was foisted falsely. If the claim of the accused that he has some relationship with the daughter of P.w.14 then the conclusions that we are taking and the accused did not identify himself as Abdul, there is no error of

such conclusion or finding. There is no reason therefore to reject this circumstance as not proved.

28. The prosecution has proved that Amit was kidnapped, it has proved that he was kidnapped by the accused, it has proved that he was killed by the accused. The voice of the accused is identified and hence there is no missing link in the entire chain of evidence and there is therefore no error in the findings recorded by the learned trial Judge.

29. That takes us to the so called common sense question, framed by the learned advocate for the accused and those are grossly irrelevant for the simple reason that the ransom money whether five crores or anything less was never paid. That the bag was recovered by the railway police is sought to be disbelieved for the reason that the railway would not allow such a thing to lie on railway track for days together. It is a pure hypothetical submission and deserves to be rejected. Whether law needs any change or not is not for this court to decide. The submission made by the advocate in that regard are therefore useless.

30. We have carefully considered all the submissions

made on behalf of the accused. We have considered all the contentions raised by him and therefore we would like to note that inspite of having considered all this and given him adequate opportunity of hearing, the advocate for the accused insisted on consuming further time of the court. Since all material questions were raised and insistance on repetitions was avoidable and was therefore avoided. In our considered opinion, all relevant submissions made are adequately dealt with by us and we are firmly of the opinion that the order passed by the learned Sessions Judge convicting the accused is correct and valid and deserves to be upheld. However taking into consideration the fact that the age of the accused is young, the fact that the matter is pending for trial and now in appeal for less than 10 years, consecutive punishment may be little harsh. In any event the accused is penalised for imprisonment for life. In our opinion interest of justice would be met if all the sentences are made to run concurrently. Except this modification the entire judgment and order of conviction is confirmed. Appeal therefore fails and is dismissed.

*****